IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 67 of 2020
[In the High Court at Lautoka Case No. HAC 63 of 2016]

BETWEEN	**:**	**SAIYAD KHAN aka DENNIS**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA**
Counsel	**:**	**Mr. J Reddy and Mr. Y. Kumar for the Appellant**
	:	**Mr. A. Singh for the Respondent**
Date of Hearing	**:**	**29 August 2023**
Date of Ruling	**:**	**30 August 2023**

RULING

[1] The appellant had been charged with one count of rape under the Crimes Act, 2009 at Lautoka High Court. The charge was as follows:

> ***'COUNT 1***
>
> ***Statement of Offence***
>
> ***RAPE:*** *Contrary to section 207(1) and (2) (a) of the Crimes Act of 2009.*
>
> ***Particulars of Offence***
>
> *Saiyad Khan aka Dennis, on the 29th day of September 2014, at Nadi, in the Western Division, had carnal knowledge of Shayal Shika Kumar, without her consent.*

[2] The assessors had unanimously opined that the appellant was guilty. The learned High Court judge found the appellant guilty of rape and he was convicted accordingly. On 07 July 2020 the appellant was given a sentence of 10 years imprisonment with a non-parole period of 07 years. After the pre-trial remand

period was discounted the sentence became 09 years, 11 months and 12 days with a non-parole period of 06 years, 11 months and 12 days.

[3] The High Court judge had summarised the facts in the sentencing order as follows.

> *2. You have pleaded not guilty to the charge and the ensuing trial lasted for 2 days in your absence. The complainant Shayal Shika Kumar, Mr. Sandip Patil who worked for you and a doctor on behalf of the doctor who examined the alleged victim, gave evidence for the prosecution. The assessors unanimously found you guilty and this court having reviewed the evidence, conquered with the opinion of the Assessors, found you guilty and convicted you of the said count.*
>
> *3. It was proved during the trial that, being the employer of Shayal Shika Kumar how you abused, drugged her and raped her at a hotel in Nadi.*
>
> *4. You were the employer of the complainant during the alleged period. The complainant came to work under you to earn money for her University studies. Instead of helping her, you drugged her and preyed upon her. It is obvious that you drugged her since she did not consent to have sexual intercourse with you.*

[4] The appellant had pleaded not guilty to the charge in the High Court. However, before the case was taken up for trial, he abstained himself from court. His counsel too had later withdrawn due to lack of instructions. The prosecution informed the High Court that the appellant had left the country in violation of bail conditions. All endeavours to bring the appellant to court to face trial had failed and the trial judge upon being satisfied that the appellant was absent without a valid excuse, had proceeded with the trial in his absence. State counsel submitted at the leave to appeal hearing that the appellant is yet to be arrested and supposedly left Fiji on a different passport before the trial commenced and not returned thereafter.

[5] The appellant through his lawyers had filed a timely appeal against conviction and sentence supplemented by written submissions. The State had not filed written submissions despite directives by this court.

[6] The appellant's appeal against conviction is timely. In terms of section 21(1)(b) and (c) of the Court of Appeal Act, the appellant could appeal against conviction and sentence only with leave of court. For a timely appeal, the test for leave to appeal against conviction and sentence is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[7] Further guidelines to be followed when a sentence is challenged in appeal are whether the sentencing judge (i) acted upon a wrong principle; (ii) allowed extraneous or irrelevant matters to guide or affect him (iii) mistook the facts and (iv) failed to take into account some relevant considerations [vide **Naisua v State** [2013] FJSC 14; CAV0010 of 2013 (20 November 2013); **House v The King** [1936] HCA 40*;* (1936) 55 CLR 499, **Kim Nam Bae v The State** Criminal Appeal No.AAU0015].

[8] The grounds of appeal urged by the appellant are as follows:

Conviction:

Ground 1

THAT the learned Judge erred in law by informing the assessors during summing up that the appellant after being released on bail failed to appear in court without a valid excuse and all efforts to bring him to court had failed, thereby creating imputing negative and prejudicial impression against the appellant and thereby imputing and creating a sense of guilt against the appellant and as such there was a substantial miscarriage of justice.

Ground 2

THAT the learned prosecutor failed to lead material evidence from the witness PW1 which would have assisted the case against the appellant thereby creating doubt in the evidence of PW1 against the appellant and as such there was a substantial miscarriage of justice.

Ground 3

THAT the learned prosecutor failed to lead material evidence from the witness PW2 which would have assisted the case against the appellant thereby creating doubt in the evidence of PW1 against the appellant and as such there was a substantial miscarriage of justice.

Ground 4

THAT the learned prosecutor failed to call a material witness who is referred to as Sweta by both PW 1 & PW2 in their examination in chief during trial which would have assisted the case against the appellant thereby creating doubt and inconsistencies in the evidence of PW1 and PW2

Ground 5

THAT the learned prosecutor failed to call a material witness who was the original doctor who examined and wrote the medical report which was tendered as evidence during trial and as such there was a substantial miscarriage of justice.

Ground 6

THAT the learned prosecutor failed to tender in court the clothes that were worn by the complainant that included her panty because if the allegation was true the panty would have blood stains and by not doing so there was a substantial miscarriage of justice.

Ground 7

THAT the learned Judge erred in law in failing to provide a balanced and adequate summing up of the prosecution evidence that were favourable to the defence and as such there was a substantial miscarriage of justice.

Ground 8

THAT the learned trial Judge erred in law and fact in not adequately directing the assessors on the significance of the prosecution witness conflicting evidence during the trial.

Ground 9

THAT the learned trial Judge erred in law and in fact in not directing himself and or the assessors on previous inconsistent statements by the Prosecution witnesses.

Sentence:

Ground 10

THAT the appellant appeals against sentence as it is manifestly harsh, excessive and wrong in principle under the circumstances of the case.

Ground 11

THAT the learned trial Judge erred in law in failing to use proper sentencing guidelines resulting in a sentence which was harsh and excessive.

Ground 1

[9] Although, the trial judge had informed the assessors at paragraph 3 that the reason to try the appellant in his absence was that after getting released on bail he had failed to appear in court and all efforts to bring him to court had failed, the judge had quickly added that the assessors should not consider his absence in any way against him in deciding the case which must be decided only on the merits of the evidence presented in court. Thus, what the trial judge said about the reason for the appellant's absence appears to be unwarranted, no miscarriage of justice could ensue because of the strong warning that followed.

Ground 2 & 3

[10] The Appellant alleges that the prosecutor failed to lead material evidence from witnesses PW1 and PW2 which would have assisted the case against the appellant thereby creating doubt in the evidence of PW1 & PW2 against the appellant and as such there was a substantial miscarriage of justice. The appellant's written submissions have not substantiated what material evidence the prosecutor had failed to lead of PW1, the complainant and PW2, Sandip Patil.

Ground 4

[11] The appellant alleges that the prosecutor failed to call a material witness who is referred to as Shweta by both PW1 & PW2 in their examination-in-chief during trial which would have assisted the case against the appellant thereby creating doubt and inconsistencies in the evidence of PW1 and PW2.

[12] Calling witnesses is the prerogative of the prosecution and if the evidence of Shweta was favourable to the defence, the appellant by himself or through his counsel could have summoned her as a defence witness.

Ground 5

[13] The appellant alleges that the prosecutor failed to call a material witness who was the doctor who examined and wrote the medical report which was tendered as evidence during trial by another doctor and as such there was a substantial miscarriage of justice.

[14] Dr. Kelera Tabuaniqili (PW3), a Senior Medical Officer had explained in her evidence that she knew Dr. Gayanendra Bimal Prasad who had examined the complainant and prepared the medical report (PE1) and she could identify Dr. Bimal Prasad's hand writing and signature as well. Therefore, the authenticity of PE1 was not in issue. Thus, there was no miscarriage of justice at all by Dr. Kelera producing PE1 and giving evidence based on it at the trial.

Ground 6

[15] The appellant submits that the prosecutor failed to tender in court the clothes that were worn by the complainant that included her panty because if the allegation was true the panty would have blood stains and by not doing so there was a substantial miscarriage of justice

[16] The complainant does not appear to have said in her evidence that the panty she wore at the time of the incident had blood stains though Dr. Bimal Prasad had observed an abrasion with bleeding on the external vagina area with raptured hymen at 6 O'clock region. The complainant's evidence may explain why the prosecution did not want to produce her panty.

[17] It was for the prosecution to produce that amount of evidence which it thought sufficient to prove the case against the appellant beyond reasonable doubt and it had no obligation to produce anything else.

Ground 7

[18] The appellant argues that the trial Judge erred in law in failing to provide a balanced and adequate summing up of the prosecution evidence that were favourable to the defence and as such there was a substantial miscarriage of justice

[19] This is also a totally unsubstantiated allegation. I find the summing-up to be balanced, objective and fair.

Ground 8 and 9

[20] The appellant contends that the learned trial judge erred in law and fact in not adequately directing the assessors on the significance of the prosecution witnesses' conflicting evidence during the trial.

[21] The trial judge had indeed directed the assessors on how to evaluate inconsistencies at paragraphs 9, 10 and 11 of the summing-up. The trial judge at paragraph 6 of the judgment had stated that in PW1's evidence there were hardly any contradictions. Thus, there does not appear to have been any material contradictions, inconsistencies or omissions in the prosecution case either *inter se* or *per se*.

[22] In any event, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witnesses and therefore the broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (see **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) at [14] & [15].

Ground 10 and 11 (sentence)

[23] The appellant argues that the trial judge had failed to apply the proper sentencing guidelines and the sentence was harsh and excessive.

[24] The tariff for adult rape is well settled to be between 07 and 15 years of imprisonment [vide **Lal v State** [2021]; AAU 016.2016 (03 June 2021), **Kasim v State** [1994] FJCA 25; Aau0021j.93s (27 May 1994) and **Rokolaba v State** [2018] FJSC 12; CAV0017 (26 April 2018)]. The trial judge had followed the same tariff at paragraph 11 of his sentencing order.

[25] I see no sentencing error in the final sentence and it is not excessive or harsh given the aggravating circumstances. If at all, the trial judge may have erred in imposing a sentence on the lower side of the tariff.

Orders

1. Leave to appeal against conviction is refused.
2. Leave to appeal against sentence is refused.

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Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL